MOTION FILED
FEB 12 1991

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE HONORABLE ELLIS GREGORY, JR. and
THE HONORABLE ANTHONY P. NUGENT, JR.,
Petitioners,

v.

THE HONORABLE JOHN D. ASHCROFT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

MOTION OF THE MISSOURI BAR FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

W. H. BATES
KAREN M. IVERSON
*TIMOTHY K. MCNAMARA
LATHROP, NORQUIST & MILLER
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108

*Counsel of Record

Attorneys for Amicus Curiae
The Missouri Bar

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

BEST AVAILABLE COPY

QUESTIONS PRESENTED

(1) Whether state court judges who regularly stand for retention elections are either "elected" officials or appointed officials on the "policymaking level," so as to be excluded from coverage under the Age Discrimination in Employment Act.

(2) Whether a state constitutional provision requiring state court judges to retire at age seventy has any rational basis under the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iv
Motion of The Missouri Bar for Leave to File Brief of Amicus Curiae	vii
Interest of Amicus Curiae	1
Statement of the Case	2
Summary of Argument	3
Argument	4
I. Missouri State Court Judges Are Not Employees Within the Meaning of the Age Discrimination in Employment Act	4
A. State Court Judges Are Elected Officials Under the Terms of the Missouri Court Plan	4
B. The Federal Government Should Not Interfere with the Form of Government Selected by the People of Missouri	7
C. If State Court Judges Are Not Elected Officials, They Are Appointees on the Policy-making Level	7
II. The Mandatory Retirement Provision Represents a Rational Balancing of Public Policy Benefits	7
Conclusion	15

TABLE OF AUTHORITIES

Page

Cases:

EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989) 7

EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988) 7

EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) 6,7

Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990) 5,7

Haten v. Rains, 854 F.2d 687 (5th Cir. 1988), *cert. denied*, __ U.S. __, 109 S.Ct. 3156 (1989) 14

In re Stout, 559 A.2d 489 (Pa. 1989) 7,14

Malmed v. Thornburgh, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980) 8,14

Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976) (per curiam) 7

O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978) (en banc) 13,14

Palmer v. Ticcione, 576 F.2d 459 (2d Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) 13

Saetre v. Minnesota, 398 N.W.2d 538 (Minn. 1986) 14

Trafelet v. Thompson, 594 F.2d 623 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979) 12,13

Zielasko v. Ohio, 873 F.2d 957 (6th Cir. 1989) 14

Articles:

C. Blackmar, Speech to the Kansas City Metropolitan Bar Association (Dec. 14, 1990), *reprinted in* 4 Mo. L. Weekly 1291 (Dec. 24, 1990) 12

B. Carbon and L. Berkson, *Judicial Retention Elections in the United States* (1980) 9,10,12

Crowdus, *Twenty Years of the Missouri Non-Partisan Court Plan*, 18 J. Mo. Bar 122 (1962) 8

12 *Debates of the Missouri Constitution 1945* (1945) 11,12

EEOC Opinion letter to Rep. Claude Pepper, April 7, 1987, *reprinted in* EEOC Compliance Manual (BNA) 6

S. Escovitz, *Judicial Selection and Tenure* (1975) 8

L. Faust, *Constitution Making in Missouri: The Convention of 1943-44* (1971) 10

Henker, *Experience Under the Missouri Non-Partisan Plan*, in Judicial Selection and Tenure 37 (G. Winters ed. 1967) 12

Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, in Judicial Selection and Tenure 40 (G. Winters ed. 1967) 8

A. Kales, "Methods of Selecting and Retiring Judges," an address to the Minnesota State Bar Association (Aug. 20, 1914), *reprinted in* 11 J. Am Judicature Soc'y 133 (1928) 9

A. Kales, *Unpopular Government in the United States* (1914) 9

Laski, *The Technique of Judicial Appointment*, 24 Mich. L. Rev. 539 (April 1926) 9

Papier, *Insulating Incumbent Judges from the Vicissitudes of the Political Arena: Retention Elections as a Viable Alternative*, 15 Fordham Urb. L. J. 743 (1987) 12

T. Pyne, *Judicial Retirement Plans* (1984) 14

Winters, *ABA House of Delegates Approves Model Judicial Article for State Constitutions*, 45 J. Am. Judicature Soc'y 279 (1962) 10

Webster's Third New International Dictionary (3d ed. 1971) 5

Constitutional and Statutory Authorities:

29 U.S.C. § 630(f) 3,4

29 U.S.C. §§ 621-634 4

Mo. Const. art V, § 25 5

Mo. Const. art V, § 26 ..... *passim*

Mo. Const. of 1875 art. VI 8

U.S. Const. amend. XIV 3,7

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE HONORABLE ELLIS GREGORY, JR. and
THE HONORABLE ANTHONY P. NUGENT, JR.,
Petitioners,

v.

THE HONORABLE JOHN D. ASHCROFT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

MOTION OF THE MISSOURI BAR FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

The Missouri Bar respectfully moves this Court for leave to file the attached brief of *amicus curiae* in this case. The consent of the attorney for respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

The Missouri Bar is a unified bar comprised of all attorneys licensed to practice law in the State of Missouri, approximately 19,000 in number. As such, The Missouri Bar has a unique and transcendent interest in promoting a state judiciary of the highest caliber and integrity.

If permitted to file the attached brief, The Missouri Bar can offer a perspective distinct from that of respondent because of its significant role in the development of the Non-Partisan Court Plan challenged by petitioners. In the attached brief, The Missouri Bar discusses the legislative and constitutional history of Missouri's Non-Partisan Court Plan and the underlying policy considerations prompting inclusion in that plan of a uniform and mandatory retirement age for all trial and appellate judges in the state court system. If this Court permits The Missouri Bar to file its brief of *amicus curiae*, the arguments presented will complement those of respondent and provide additional insight into the laudable objectives served by Missouri's Non-Partisan Court Plan.

Respectfully submitted,

W. H. Bates
Karen M. Iverson
*Timothy K. McNamara
Lathrop, Norquist & Miller
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 842-0820
FAX 421-0500

*Counsel of Record

Counsel for The Missouri Bar

February 12, 1991

No. 90-50

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE HONORABLE ELLIS GREGORY, JR. and
THE HONORABLE ANTHONY P. NUGENT, JR.,
Petitioners,

v.

THE HONORABLE JOHN D. ASHCROFT,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Missouri Bar exists pursuant to Missouri Supreme Court Rule 7. It is a unified Bar comprised of approximately 19,000 attorneys licensed to practice law in the State of Missouri. Accordingly, The Missouri Bar has a unique interest in preserving a state judiciary of the highest caliber and integrity.[1] It was with this interest in mind that The

[1] The preamble to Missouri Supreme Court Rule 7 states: "[I]t is the 'responsibility of the members of the Bar of this Court and of all lawyers who practice in the State of Missouri' to 'strive . . . to improve not only the law but the administration of justice.' " (quoting former Missouri Supreme Court Rule 4).

Missouri Bar assisted in creating and assuring the passage of the Non-Partisan Court Plan embodied in Article V of the Missouri Constitution (the "Missouri Plan"). Petitioners now challenge the mandatory retirement provision of the Missouri Plan. This provision is an integral part of the Non-Partisan Court Plan and The Missouri Bar urges this Court to reject petitioners' contentions.[2]

Prior to the adoption of the Missouri Plan, the abuse of a partisan system of judicial selection had undermined the Missouri public's confidence in its courts. In response, the Non-Partisan Court Plan was created to assure an impartial and independent judiciary. As an original and integral part of that planned system, appellate judges were required to retire at age seventy-five (later modified to require all judges to retire at age seventy). Mandatory retirement provided a counterweight to the advantages of incumbency created by the new system of retention elections. Mandatory retirement further protected the public from the risk that some judges would continue to serve after their capacity to carry heavy case loads or reason clearly had been diminished or impaired by age. In addition to these fundamental protections, mandatory retirement created predictability and provided a means of assuring an orderly removal of judges without the indignity of hearings and impeachments.

The people of Missouri adopted the Non-Partisan Court Plan and its various revisions following extensive debate within the legal community and the public as a whole. The Missouri Plan has been widely emulated by other states and remains a model for the maintenance of an independent and qualified judiciary. The Missouri Bar seeks to preserve intact the Non-Partisan Court Plan which has served the people of Missouri well for the past fifty years.

STATEMENT OF THE CASE

The Missouri Bar adopts the respondent's statement of the facts of the case.

---

[2] The Board of Governors of The Missouri Bar (following its established procedures) approved the submission of this *amicus curiae* brief.

SUMMARY OF ARGUMENT

Petitioners challenge the validity of Article V Section 26 of the Missouri Constitution on two grounds. They allege that this restriction violates the federal Age Discrimination in Employment Act ("ADEA") and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Neither argument has merit.

The ADEA explicitly excepts from its provisions persons "elected to public office" and appointees "on the policymaking level." 29 U.S.C. 630(f) (1988). A judge selected under the Missouri Plan must stand in a retention election at the end of his or her initial and any subsequent terms. Because petitioners stand for retention election, they are elected officials exempted from the provisions of the ADEA.

Even if petitioners are not "elected" officials within the meaning of the ADEA, they are appointees on the policymaking level and exempt from its coverage. Every judge is a policymaker regardless of judicial philosophy. Even the most strict constructionist is required to interpret legislative intent and resolve unsettled areas of law. Petitioners therefore are not within the protections of the ADEA.

Petitioners' argument that Article V Section 26 violates the Equal Protection Clause is equally without merit. Age is not a suspect classification and therefore petitioners bear the burden of demonstrating that no rational basis could exist for the state's policy. When the mandatory retirement provision is viewed in relation to the Missouri Plan as a whole, the rational basis for this section becomes readily apparent.

The Non-Partisan Court Plan was enacted as a reform measure to Missouri's prior system of partisan election of judges. Under the new system, however, judges were much less likely to be removed from office by the voters. As a result, a mandatory retirement age became preferable. This provision avoided the risk that some judges would continue in office after their mental capabilities and ability to handle a demanding case load had been diminished or impaired by age. In addition, a mandatory retirement age provided a dignified and orderly manner for removing judges from the bench rather than resorting to hearings and impeachment proceedings.

ARGUMENT

I. MISSOURI STATE COURT JUDGES ARE NOT EMPLOYEES WITHIN THE MEANING OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

The Honorable Ellis Gregory, Jr., and the Honorable Anthony P. Nugent, Jr., challenge Article V Section 26 of the Missouri Constitution as a violation of the federal Age Discrimination in Employment Act, ("ADEA"), 29 U.S.C. §§ 621-634. To gain the protections of the ADEA, however, the petitioners must demonstrate that they are employees within the provisions of the Act. An "employee" is defined as:

> [A]n individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (1988).

State court judges appointed under the Missouri Non-Partisan Court Plan fail to meet this definition in two respects. First, although initially appointed to the bench, judges under the Missouri Plan face regular retention elections and therefore are elected officials expressly excepted from the ADEA's definition of an "employee." Second, if judges are not considered elected officials, they are certainly appointees on the policymaking level. Neither Judge Gregory nor Judge Nugent falls within the definition of an "employee" as set forth by the ADEA. The Eighth Circuit properly upheld the dismissal of their case in the court below.

A. State Court Judges Are Elected Officials Under the Terms of the Missouri Court Plan.

The Missouri Non-Partisan Court Plan provides for the selection of judges in a three-step process. A merit screening commission, consisting of a judge, members of the Bar, and lay persons, nominates three qualified candidates to fill a vacancy on the bench. Mo. Const. art. V, § 25(d). From these candidates, the Governor selects one to be appointed to the bench for an initial term of twelve months. Mo. Const. art. V, § 25(a). Following this initial period in office, each judge must face an election in which the voters of Missouri cast their ballots to determine whether or not the judge should be retained. Mo. Const. art. V, § 25(c)(1).

Because the initial selection process is by means of appointment, the district court erroneously found that these judges were not elected officials. The Eighth Circuit did not address this issue but noted its disagreement with the district court's holding. *Gregory v. Ashcroft*, 898 F.2d 598, 600 (8th Cir. 1990). The Missouri Bar respectfully suggests that the district court was in error because Missouri state court judges reelected under a retention system are "elected officials" within the meaning of the ADEA.

There is no question that the drafters of the Missouri Constitution considered judges to be elected officials. The language of the Constitution expressly discusses the "election" of judges. The provision governing the means by which these judges are selected states that a judge must "file in the office of the secretary of state a declaration of candidacy for election to succeed himself." Mo. Const. art. V, § 25(c)(1). That section further provides that the name of the judge who submits a declaration of candidacy "shall be submitted at said next general election to the voters eligible to vote within . . . the geographic jurisdiction limit of the district where he serves. . .." *Id.* If a majority of those voting deny retention, the judge must step down at the end of his term. *Id.*

The people of Missouri adopted this provision. The Court therefore must look to the common, not technical, meaning given this provision by the voters. According to Webster's Dictionary, an election is "the act or process of choosing a person for office, position, or membership by voting." *Webster's Third New International Dictionary* (3d ed. 1971). This definition does not require two persons to oppose one another on the ballot. The choice presented to the public is the retention or rejection of a judge for office.

The Equal Employment Opportunity Commission apparently agrees with this assessment. According to the Commission, a state court judge "who is appointed by the governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.' " EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, *reprinted in* EEOC Compliance Manual (BNA) at N:1001, note 2. The Missouri Bar wholeheartedly agrees with this position.

If judges selected under the Missouri Plan are not considered "elected officials," then the state judiciary would be divided into two classifications with an irrational result never intended by the people. Not all Missouri judges are subject to the Non-Partisan Court Plan. Although all appellate judges are selected and retained under the Plan, a large number of circuit court (trial court) judges must run in partisan elections. The Missouri Plan only applies to circuit courts in the Kansas City and St. Louis metropolitan areas. If the ADEA applies only to judges selected under the Missouri Plan, then judges on an identical jurisdictional level will be treated differently depending on the circuit in which they serve. That is, all judges chosen in partisan elections would be required to retire at age seventy; no judge chosen under the Missouri Plan would be required to retire at any age. All Missouri judges should be treated as "elected officials." The elective process clearly distinguishes *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990).

At most general elections, Missouri voters choose between retaining a judge in office or requiring his or her replacement by some other qualified candidate. This choice is made by casting a ballot and the choice of the majority prevails. The Governor may not intercede; the legislature has no input; the decision belongs strictly to the people. To describe this process as an appointment is to ignore the plain intent and practical operation of the judicial article of the Missouri Constitution and to achieve a result never contemplated by Congress in enacting the ADEA. A judge who serves at the will of the people and who can be voted out of office is, by any reasonable interpretation, an elected official.

B. The Federal Government Should Not Interfere with the Form of Government Selected by the People of Missouri.

Judge Bowman, in the opinion below, and the Second Circuit Court of Appeals, in *EEOC v. Vermont*, noted the importance of states' rights in the procedures for selecting judicial officials. The Missouri Bar has been advised that the respondent will argue that the Supremacy Clause does not apply in this case. The Missouri Bar fully supports the respondent's position and will therefore not reiterate those arguments here, other than to note the important observation of the First Circuit:

> Without question, the tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state. Any federal encroachment on a state's freedom of choice in this area, therefore, strikes very close to the heart of state sovereignty.

EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988).

C. If State Court Judges Are Not Elected Officials, They Are Appointees on the Policymaking Level.

This issue has been well addressed by the courts and parties below. The Missouri Bar merely adds its voice to the majority of courts which have held that appointed judges are clearly policymakers of the highest level and therefore should not be included within the terms of the ADEA. *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir. 1990); *EEOC v. Massachusetts*, 858 F.2d 52 (1st Cir. 1988); *EEOC v. Illinois*, 721 F. Supp. 156 (N.D. Ill. 1989); *In re Stout*, 559 A.2d 489 (Pa. 1989).

II. THE MANDATORY RETIREMENT PROVISION REPRESENTS A RATIONAL BALANCING OF PUBLIC POLICY BENEFITS

The petitioners allege that Article V Section 26 conflicts with the Fourteenth Amendment to the United States Constitution. Age is not a suspect classification. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam). The burden is upon the petitioners to demonstrate that there is no rational basis for the state's

policy. *Malmed v. Thornburgh*, 621 F.2d 565, 569 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980). A rational basis is shown when the mandatory retirement provision is viewed in the context of the entire Missouri Non-Partisan Court Plan and the history leading to its adoption.

The people of Missouri adopted a constitution that was designed to provide a judiciary of the highest caliber. The Non-Partisan Court Plan was a compromise solution to address and balance two concerns of transcendent public interest: (1) creating and maintaining an independent and impartial judiciary; and (2) ensuring that the judiciary was responsible to the people. The method chosen by the people of Missouri to achieve these goals is entitled to the greatest deference. This Court should not tamper with the system established by the people of Missouri absent extraordinary circumstances and public policy considerations that do not exist here.

Prior to implementation of the Missouri Plan, state court judges were selected by partisan vote. *See* Mo. Const. of 1875 art. VI. The result was a highly unsatisfactory mix of politics and justice which severely undermined the confidence of the public in the court system. *See generally*, Crowdus, *Twenty Years of the Missouri Non-Partisan Court Plan*, 18 J. Mo. Bar 122 (1962). "At times the results flowing from this system ranged from the ludicrous to the near chaotic." Hunter, *A Missouri Judge Views Judicial Selection and Tenure*, in Judicial Selection and Tenure 40 (G. Winters ed. 1967). The greatest threat to an independent judicial branch was the dominance of political parties in the selection of judges. "Elections often became rubber-stamp confirmations of the machine's slate, not the Jacksonian ideal of individual and equal expression of free will through the ballot." S. Escovitz, *Judicial Selection and Tenure* 4 (1975). The dominance of politics discouraged qualified candidates and resulted in the election of many judges with little or no qualifications. *Id.* In one instance, a circuit court judge was elected to the bench directly from his practice as a pharmacist. Crowdus, *supra*, at 124. In another instance, a popular judge of the supreme court barely survived reelection after being openly attacked by a notorious but powerful political party boss, Tom Pendergast. *Id.*

The use of partisan elections had other less direct effects on the quality of the judiciary. Judges running on a party ticket were swept in and out of office along with the tides of national politics. Because attorneys were assured no tenure on the bench, they were reluctant to leave a successful law practice for public office. Even when qualified lawyers became judges, precious judicial resources were squandered during their campaigns for reelection. Finally, the qualifications needed to win a general election did not necessarily correspond with those needed to exercise sound judicial discretion. *See* B. Carbon and L. Berkson, *Judicial Retention Elections in the United States* (1980).

The problems created by the partisan election of judges were matters of national concern. Throughout the United States, judicial systems struggled with the balance of politics and an independent judiciary. The debate concerning possible solutions was sharply divided. Some critics suggested that an independent judiciary could be maintained only through the appointment of judges with a life tenure. The only limitation suggested was mandatory retirement at age seventy to seventy-five. Laski, *The Technique of Judicial Appointment*, 24 Mich. L. Rev. 539, 543 (April 1926). On the other hand, the progressive movement argued that persons in such important policymaking positions should be accountable and responsive to the public. B. Carbon & L. Berkson, *supra*, at 2. The net result of this debate was the creation of non-partisan retention elections.

Albert Kales is credited with proposing the first non-partisan court plan in his book *Unpopular Government in the United States* (1914). The Kales plan had three major features. First, a judicial counsel would be created to recommend candidates with appropriate credentials. This would obviate the problem of inappropriate candidates assuming the bench. Second, to make the plan responsive to the public, a Chief Justice would be elected in a partisan election. He then would appoint candidates to the bench. Third, once appointed, the candidates would stand for retention elections until death or mandatory retirement. Kales, "Methods of Selecting and Retiring Judges," an address to the Minnesota Bar Association (Aug. 20, 1914), *reprinted in* 11 J. Am. Judicature Soc'y 133, 134 (1928).

In 1937, the American Bar Association adopted a plan based in significant part on that outlined by Kales, but did not enumerate details. B. Carbon & L. Berkson, *supra* p.12, at 4. This plan, including a mandatory retirement provision, was again approved in 1962. Witners, *A.B.A. House of Delegates Approves Model Judicial Article for State Constitutions*, 45 J. Am. Judicature Soc'y 279, 281 (1962).

In 1940, Missouri became the first state to enact a non-partisan court plan based on the model recommended by the American Bar Association. The Missouri Plan contained three major elements: (1) a nominating committee composed of attorneys, judges and laymen selected three nominees for appointment; (2) the governor appointed one candidate from those nominated; and (3) once in office, the judge would serve twelve months and then face a retention election. The judge could continue to serve as many consecutive terms as the voters allowed.

The Missouri Plan was initially adopted by the Missouri voters through a constitutional initiative in 1940. In 1942, the legislature resubmitted the Plan to the voters claiming the people had not understood its provisions. At this second election, the Plan passed by a margin of 172,521 votes. L. Faust, *Constitution Making in Missouri: The Convention of 1943-44* 100 (1971). The Non-Partisan Court Plan was again at issue during Missouri's constitutional convention of 1943-44. The delegates to the convention retained the Missouri Plan and added a provision requiring all appellate judges to retire at age seventy-five. The voters approved the new constitution in a general election in 1945. *Id.* Finally, in 1970, the voters again approved the Missouri Plan and added the present mandatory retirement provision which is the subject of this proceeding. Thus, the voters of Missouri have had four opportunities to abandon the Missouri Court Plan, including two elections at which mandatory retirement was in issue, and have consistently refused to do so.

During the debates of the 1943-44 constitutional convention, the delegates directly addressed the issue of mandatory retirement. The concerns expressed by these delegates demonstrate the importance of mandatory retirement as part of the Non-Partisan Court Plan as well as

the rational basis that supports it. As one delegate, Judge Mayer, noted:

> There are some men past seventy-five that would be just as good judges as they would have been at fifty but they are the exception and not a rule. I feel that we ought to be very certain that when a judge reached seventy-five, *especially if we have the present court plan*, we ought to be very sure that when he reaches seventy-five he has to retire.

12 *Debates of the Missouri Constitution 1945* 3541 (1945) (One Hundred Fifty-First Day) (emphasis added).

The provision did not pass without debate, however. An opposing position was introduced by Judge Williams who argued that an arbitrary line drawn at age seventy-five would deprive the bar of qualified judges. Judge Mayer responded to this argument: "I hope we won't be burdened here with a lot of sentimentality about old men and wise men and protecting men. We ought to have some common sense about the election of our judges." *Id.* at 3548. Indeed, Judge Mayer argued that the mandatory retirement provision worked to the benefit of a prospective judge. Voters would be more willing to reelect a judge at age sixty-five, if they did not need to be concerned about his service into later years. More importantly, Judge Mayer noted the reality of aging:

> I am no longer a young man but I have brains enough to know that I can't stand the punishment I could a few years ago and any old man here who thinks he can is just fooling himself and there isn't any sense in his doing so. We all know as we grow older we have to let up a little on the work we are doing and we all know that when one of the judges lets up on the work he is doing some other judge has to do it for him or the court gets behind.

Id.

Judge Williams countered that incompetent judges could be removed by means of a hearing committee provided for in Section 28 of the proposed constitution. Judge Mayer again provided the response:

> Now, Judge Williams says that this provision 28 perfectly covers it. In other words, they have got to yank a fellow in and select three judges from the court of appeals and three from the circuit court and three from the Supreme Court and try him because of mental infirmity and physical infirmity and inefficiency. Well, what court, if an old judge can find his way home and back, who had served the country well, would want to drag him in and have that kind of trial? Wouldn't it be a better thing for him to follow the Constitution itself and step out than to be dragged in before that sort of a tribunal which might become necessary as he grew older?

Id. at 3549. After careful consideration and debate, the mandatory retirement provision was put to a vote on the two hundred and tenth day of the convention and was approved by a vote of fifty-nine to eight.

Retention elections combined with merit selection have succeeded in creating an independent and highly qualified judiciary in Missouri. C. Blackmar,Speech to the Kansas City Metropolitan Bar Association (Dec. 14, 1990), *reprinted in* 4 Mo. L. Weekly 1291 (Dec. 24, 1990); Henker, *Experience Under the Missouri Non-Partisan Plan*, in Judicial Selection and Tenure 37, 39 (G. Winters ed. 1967). The use of retention elections, however, requires certain limitations. "When . . . [retention] is the sole issue [on the ballot], it will be extremely difficult to get a popular majority against any fairly successful judge." B. Carbon & L. Berkson, *supra* p. 9, at 6. *See also Trafelet v. Thompson*, 594 F.2d 623 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979) (because of the retention system, it is much more difficult to dislodge a judge than an official who must run against another candidate).

This, of course, was the intent of the drafters of the Missouri Plan. Qualified judges screened by a merit commission and appointed by the Governor should succeed in retention elections. "Historical examination . . . reveals that retention elections were initially designed to ensure that qualified judges be retained on the bench." Papier, *Insulating Incumbent Judges from the Vicissitudes of the Political Arena: Retention Elections as a Viable Alternative*, 15 Fordham Urb. L. J. 743 (1987). Unfortunately, the advantage given incumbents may allow

some judges to remain in office past the age at which they can fully perform their duties. Thus, the mandatory retirement provision is a necessary element to counteract the use of retention elections. "Mandatory retirement for judges is rationally related to the difference in the retention rights of judges and other elected officials." *Trafelet*, 594 F.2d at 627.

The Missouri Plan provides a benefit for prospective judges. They are no longer burden with raising funds, political campaigning, the vagaries of public opinion, and the uncertainty of tenure. They must accept retirement at age seventy, however. Although an arbitrary retirement age may require some qualified judges to step down (although they remain eligible for special assignment), the net result of this system is the preservation of a politically independent judiciary with necessary safeguards to assure the highest quality judicial officer.

The Missouri Supreme Court has enumerated several additional grounds which rationally and correctly support the use of mandatory retirement provisions. The court noted the rational for requiring mandatory retirement for teachers. "[U]nrelated to any notion of physical or mental fitness, a state might prescribe mandatory retirement for teachers in order to open up employment opportunities for young teachers or to open up more places for minorities, or to assure predictability and ease in establishing and administering pension plans." *O'Neil v. Baine*, 568 S.W.2d 761, 765-66 (Mo. 1978) (en banc) (discussing *Palmer v. Ticcione*, 576 F.2d 459 (2d Cir. 1978), *cert. denied*, 440 U.S. 945 (1979)). These policy grounds are equally applicable to members of the judiciary. "[A] state might prescribe a mandatory retirement for judges in order to 'open up' judicial opportunities for younger lawyers and to bring young persons with fresh ideas and techniques into the system." *Id.* at 767.

The Missouri Supreme Court further approved of those justifications previously discussed. "[T]he statute . . . draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not." *Id.* The court also acknowledge that "age seventy is an age—a time of life—which is recognized by society as being

'about' the time when the physical and mental processes weaken among many men and women." *Id.* In conclusion, the court stated that "compulsory retirement . . . at age seventy embodied in the statute is rationally related to the fulfillment of several legitimate state objectives . . .." *Id.*

Although also noted by the district court below, the remarks of the Missouri Supreme Court bear repeating here:

> Our citizens are entitled to a judicial system of the highest caliber and to judges with the highest possible mental and physical qualifications. Mandatory judicial retirement is an attempt by the general assembly to ensure the fitness of the judiciary as a whole and to ensure the continued competency of the system.

O'Neil, 568 S.W.2d at 766.

Thirty-seven states have enacted mandatory retirement provisions limiting the age at which judges may serve. T. Pyne, *Judicial Retirement Plans* vii (1984). In *none* of these states has a court found that there was not a rational basis for this policy. Despite repeated attacks, the courts have affirmed the right of a state's citizen to place a limit on the age of its judiciary. *Zielasko v. Ohio*, 873 F.2d 957 (6th Cir. 1989); *Haten v. Rains*, 854 F.2d 687 (5th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3156 (1989); *Malmed v. Thornburgh*, 621 F.2d 565 (3d Cir.), *cert. denied*, 449 U.S. 955 (1980); *In re Stout*, 559 A.2d 489 (Pa. 1989); *Saetre v. Minnesota*, 398 N.W.2d 538 (Minn. 1986); *O'Neil v. Baine*, 568 S.W.2d 761 (Mo. 1978) (en banc). As in the majority of other states, Missouri has made a rational policy decision to limit the age at which a judge may serve. This Court should respect this decision by the people of Missouri.

CONCLUSION

The Missouri Bar respectfully requests that this Court affirm the decision of the Eighth Circuit. The petitioners in this action are either "elected officials" or appointees on the "policymaking level" and therefore not within the scope of the ADEA. Furthermore, the Missouri Plan does not violate the Equal Protection Clause. The form of government selected by the people of Missouri should be left undisturbed.

Respectfully submitted,

W. H. Bates
Karen M. Iverson
*Timothy K. McNamara
Lathrop, Norquist & Miller
2600 Mutual Benefit Life Bldg.
2345 Grand Avenue
Kansas City, Missouri 64108
(816) 842-0820 FAX 421-0500

*Counsel of Record

Counsel for The Missouri Bar

February 12, 1991